

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JEFFREY EUGENE STIERLEY,
Appellant.

Nos. 2 CA-CR 2018-0358 and
2 CA-CR 2018-0360 (Consolidated)
Filed November 15, 2019

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Gila County
Nos. S0400CR201700324 and S0400CR201800228 (Consolidated)
The Honorable Timothy M. Wright, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Joshua C. Smith, Assistant Attorney General, Phoenix
Counsel for Appellee

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Counsel for Appellant

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MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Chief Judge Vásquez and Judge Brearcliffe concurred.

STARING, Presiding Judge:

¶1 Jeffrey Stierley appeals his convictions and sentences for aggravated domestic violence, criminal damage, and influencing a witness. We affirm Stierley’s convictions and sentences.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury’s verdicts and resolve all reasonable inferences against Stierley. *See State v. Felix*, 237 Ariz. 280, ¶ 30 (App. 2015). In 2016, Stierley and his then-girlfriend, D.S., were at her mother’s home repairing a leaky ceiling. At some point, Stierley went to his truck to look for his cell-phone charger and when he could not find it, he came back inside the house, accused D.S. of taking his charger, went into her room, and began taking things from her dresser that did not belong to him. Stierley then left the room through a door that connected to an enclosed porch; D.S. closed and locked the door behind him. D.S. returned to the kitchen and was cooking when she heard three to four loud noises, which she said sounded like Stierley kicking the door.

¶3 When D.S. went back to her room, Stierley was there and the previously undamaged door appeared to have been kicked in. Stierley then took D.S.’s cell phone and D.S. told him she was going to call 9-1-1. As D.S. turned to walk away from Stierley, he grabbed the back of her shirt, causing her to fall. Stierley fell on top of D.S. and hit her in the face with a drill. As a result, D.S. sustained a swollen lip, a scratch on her arm, and a bump on her forehead. Stierley was later arrested and charged with one count of aggravated domestic violence and one count of criminal damage.

¶4 In 2018, Stierley and D.S. met at a hotel where she was staying. Stierley was due in court that day for the 2016 charges and “wanted [D.S.] to go with him into court and change what – what [she] had said. . . . [H]e wanted [her] to come in and say that [she] had made the whole thing up.” When D.S. refused, an argument ensued, part of which D.S. was able to record on her cell phone. In the recording, Stierley is heard shouting profanely at D.S. and telling her that she would regret it if she did not go

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with him to court. D.S. later gave a copy of the recording to a detective. Stierley was charged with one count of influencing a witness.

¶5 The trial court consolidated the two cases without objection and, after a two-day jury trial, Stierley was convicted of all three counts. The trial court sentenced him to consecutive and concurrent terms of imprisonment totaling 6.75 years. This appeal followed. We have jurisdiction pursuant to article VI, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Discussion

¶6 On appeal, Stierley argues he received ineffective assistance of counsel, the trial court erred in failing to dismiss a biased juror, and the court erred by admitting an unauthenticated audio recording of Stierley.

Ineffective Assistance of Counsel

¶7 Stierley argues his trial counsel's failure to oppose the state's motion to consolidate his cases "constitutes ineffective assistance of counsel" because "no competent defense attorney would have allowed the [audio] recording to be heard by a jury that was about to begin deliberating on an assault charge in a different case involving the same two parties." Our supreme court, however, has held that "ineffective assistance of counsel claims are to be brought in Rule 32 proceedings. Any such claims improvidently raised in a direct appeal, henceforth, will not be addressed by appellate courts regardless of merit." *State v. Spreitz*, 202 Ariz. 1, ¶ 9 (2002). Accordingly, we will not address this argument.

Failure to Dismiss Juror

¶8 Stierley argues he did not receive a fair trial because the trial court erred in failing to dismiss a juror, L.H., for cause based on her alleged bias that resulted from her experiences as a victim of assault and being arrested for domestic violence. We need not address this issue, however, because Stierley did not challenge L.H. for cause and failed to use a peremptory strike to remove L.H. from the venire panel, thus waiving this argument on appeal. See *State v. Smith*, 228 Ariz. 126, ¶¶ 5-7 (App. 2011) ("[A] defendant who both fails to object to a juror and fails to remove that juror with a peremptory strike waives any challenge to the juror on appeal.") (citing *State v. Rubio*, 219 Ariz. 177 (App. 2008)).

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Admission of Audio Recording

¶9 Stierley argues the trial court erred by admitting an audio recording of him arguing with D.S. without authenticating it. We review a court's ruling on the admission of evidence for an abuse of discretion. *State v. Leteve*, 237 Ariz. 516, ¶ 18 (2015).

¶10 At trial, D.S. testified that Stierley came to her hotel room about eighteen months after the 2016 domestic-violence incident and asked her to go with him to court and change what she said had happened. D.S. recorded a portion of their interaction on her cell phone and provided the recording to a detective, who copied it on an audio disk. In the recording, Stierley is heard shouting profanity at D.S., calling her a liar and other derogatory names, and telling her that if she did not go with him to Payson—where he was due in court that day—she would be sorry.

¶11 D.S. confirmed the recording was “a fair and accurate description of what took place,” and testified the recording included Stierley “telling [her] that [she] was going to be sorry if [she] didn't go with him to court.” And, the detective testified the recording admitted into evidence and played for the jury was a copy of the one D.S. had provided him. Stierley objected to the admission of the recording and argued “that to be properly laid foundation, somebody has to identify the voice on the recording” as Stierley's. The trial court concluded D.S.'s and the detective's testimony was “sufficient for foundation because for foundation . . . all that needs to be shown is that there is sufficient evidence to support that the item is what the proponent claims it to be.” Subsequently, the recording was admitted and played for the jury.

¶12 Relying on Rule 901(b)(5), Ariz. R. Evid., Stierley maintains the state failed to authenticate the recording because no one identified his voice on the recording. Specifically, he asserts that although D.S. testified that she made the recording, “the jury [was] left with no identification of the male voice on the recording” because when the recording was played, no one identified the voices on the recording. Stierley also appears to argue the lack of a jury instruction “as to how the jury should weigh the unidentified audio recording” deprived him of a fair trial. We disagree.

¶13 “To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Ariz. R. Evid. 901(a). Rule 901 lists several ways in which evidence may be identified or authenticated, including “[a]n opinion identifying a person's voice—whether heard firsthand or through mechanical or electronic

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transmission or recording—based on hearing the voice at any time under circumstances that connect it with the alleged speaker.” Ariz. R. Evid. 901(b)(5). The methods listed in Rule 901(b), however, are “merely nonexclusive ‘examples’ and do not foreclose any other method of authentication that would meet the requirement of Rule 901(a).” *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 14 (App. 2008). Therefore, a witness identifying Stierley’s voice on the recording is not the only way to authenticate the recording. Indeed, “foundation may be laid by evidence either identifying the item or establishing chain of custody.” *State v. Steinle*, 239 Ariz. 415, ¶ 24 (2016); *see also* Ariz. R. Evid. 901(b)(1); *State v. Emery*, 141 Ariz. 549, 551 (1984) (party can lay foundation with witness testimony that item is what it is claimed to be). Further, the trial court “does not determine whether the evidence is authentic, but only whether evidence exists from which the jury could reasonably conclude that it is authentic.” *State v. Lavers*, 168 Ariz. 376, 386 (1991).

¶14 Here, D.S. testified the recording was of D.S. and Stierley’s argument and she provided the recording to the detective. And although she did not specifically identify the male voice as Stierley’s after the recording was played, she implicitly did so when she testified the recording included him telling her she would be sorry if she did not go with him to court. The detective then testified the recording was a copy of what D.S. provided him, thereby establishing a chain of custody. Therefore, sufficient evidence existed from which the jury could have reasonably concluded the male voice on the recording belonged to Stierley. *See* Ariz. R. Evid. 901(a), (b)(1); *Steinle*, 239 Ariz. 415, ¶ 24. The trial court did not abuse its discretion.

¶15 Finally, we reject Stierley’s argument that the lack of a jury instruction as to how the jury should weigh the recording deprived him of a fair trial. Although the trial court did not give an instruction about the recording specifically, it instructed the jurors that they “should consider what testimony to accept, and what to reject” and instructed them to “[c]onsider all of the evidence in the light of reason, common sense, and experience.” The court also directed the jury that: “It is for you to determine the importance to be given to the evidence, regardless of whether it is direct or circumstantial.” Therefore, the jury was properly instructed as to how to weigh the evidence. *See State v. Prince*, 204 Ariz. 156, ¶ 9 (2003) (presumption that jurors follow instructions).

Disposition

¶16 For the foregoing reasons, we affirm Stierley’s convictions and sentences.